AN IRRESISTIBLE ATTRACTION: RETHINKING ROMANTIC JEALOUSY AS A BASIS FOR SEX-DISCRIMINATION CLAIMS

KRISTY DAHL ROGERS†

ABSTRACT

Recently, the Iowa Supreme Court concluded that an employer who terminated an employee to allay the concerns of his jealous spouse did not unlawfully discriminate on the basis of sex. Though the Iowa decision addressed a claim filed under a state civil rights statute, it highlights an emerging question in broader sex-discrimination jurisprudence—whether terminating an employee based on romantic jealousy constitutes unlawful sex discrimination.

This Note argues that Title VII should be interpreted to prohibit some terminations based on romantic jealousy. Sex-discrimination claims based on romantic jealousy are properly classified as mixed-motive claims. Thus, the question courts must ask in analyzing romantic-jealousy claims is whether the jealousy that provoked a termination was motivated by gender. In some circumstances, it will be clear that gender motivated both romantic jealousy and any termination resulting therefrom.

Courts should not rely on or extend precedents involving favoritism or romantic relationships to dismiss sex-discrimination claims arising due to romantic jealousy. The rationales justifying the dismissal of claims in the favoritism and romantic-relationship contexts are inapplicable to the romantic-jealousy context. Furthermore, to dismiss claims due to the existence of nonsexual, nonromantic personal relationships between employers and employees would drastically limit Title VII's reach. To accurately

† Duke University School of Law, J.D. expected 2015; Washington University in St. Louis, A.B. 2001. Many thanks to my advisor Professor Trina Jones for her invaluable guidance in selecting a law school and in writing this Note. Thanks also to Professor Katharine Bartlett for her insightful comments and to the staff members of the *Duke Law Journal* for their thoughtful engagement throughout the editing process. Most of all, I thank my family and friends for their unwavering support and my husband, Aaron Rogers, for his constant faith and enduring love.

determine whether jealousy-based termination constitutes unlawful discrimination, courts must look behind the jealousy.

INTRODUCTION

Melissa Nelson was just twenty years old when she graduated from the dental-assistant program at Des Moines Area Community College.[1] A few months later, she accepted a position in the office of her dentist, Dr. James Knight, in Fort Dodge, Iowa, just minutes from the rural community where she attended high school.[2] Melissa continued to work for Dr. Knight for the next ten years, and she came to regard him as both a father figure and a friend.[3] When he abruptly terminated her employment, she was shocked.[4]

Dr. Knight forthrightly described his reasons for firing Melissa. In fact, he terminated her in the presence of his pastor by reading to her from a prepared statement that said his relationship with her had become a detriment to his family.[5] Dr. Knight wrote the statement after his wife, who also worked at the office, demanded he fire Melissa because she had come to view her as a threat to their marriage.[6]

That evening, Dr. Knight invited Melissa's husband to his office.[7] He repeatedly assured Mr. Nelson that Melissa had not acted inappropriately and that nothing was going on between them.[8] But Dr. Knight admitted that he thought about Melissa constantly and feared he would try to have an affair with her if he did not fire her.[9] He acknowledged that he fired Melissa because he was concerned that he had become too personally attached to her, and he admitted that she was the best dental assistant he had ever had.[10]

---

1. Joint Appendix at 62, 98, Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64 (Iowa 2013).

2. *Id.* at 32, 62, 98, 101, 131.

3. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 65 (Iowa 2013).

4. Joint Appendix, *supra* note 1, at 63.

5. *Nelson*, 834 N.W.2d at 66. A copy of Dr. Knight's handwritten statement appears in the Joint Appendix, *supra* note 1, at 38.

6. *Nelson*, 834 N.W.2d at 66.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Melissa Nelson brought a sex-discrimination suit against Dr. Knight in state district court[11] under the Iowa Civil Rights Act,[12] a state civil rights statute modeled after Title VII of the Civil Rights Act.[13] Dr. Knight moved for summary judgment,[14] arguing that Nelson had cited no direct evidence of sex discrimination and asserting that he had a legitimate, nondiscriminatory reason for terminating her—his wife demanded that he fire her to preserve their marriage.[15] The district court granted summary judgment in favor of Dr. Knight, reasoning that "Nelson was fired not because of her gender but because she was a threat to the marriage of Dr. Knight."[16] On appeal, the Iowa Supreme Court, in a controversial opinion,[17] unanimously affirmed summary judgment in favor of Dr. Knight.[18] The opinion framed the issue before the court as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views the employee as an irresistible attraction."[19] Because of this language, the media interpreted the opinion to declare that an employee may be legally fired when her boss finds her to be too attractive.[20]

---

11. *Id.* at 65, 67.

12. IOWA CODE § 216.6 (2013).

13. Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 10 (Iowa 2009). Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (2012).

14. *Nelson*, 834 N.W.2d at 67.

15. Joint Appendix, *supra* note 1, at 14–21.

16. *Nelson*, 834 N.W.2d at 67 (quotation marks omitted).

17. *See, e.g.*, Ryan J. Foley, *Iowa Court: Bosses Can Fire 'Irresistible' Workers*, ASSOCIATED PRESS, Dec. 21, 2012, *available at* http://bigstory.ap.org/article/iowa-court-bosses-can-fire-irresistible-workers; *Iowa: Court Upholds Firing of Woman Whose Boss Found Her Attractive*, N.Y. TIMES, Dec. 22, 2012, at A17; *CNN Newsroom* (CNN television broadcast Dec. 21, 2012), *available at* http://www.cnn.com/2012/12/21/justice/iowa-irresistible-worker; *Good Morning America* (ABC television broadcast Dec. 23, 2012), *available at* http://abcnews.go.com/GMA/video/dental-assistant-fired-attractive-18049209.

18. Nelson v. James H. Knight DDS, P.C., No. 11–1857, 2012 WL 6652747, at *5 (Iowa Dec. 21, 2012), *withdrawn and superseded on reh'g*, 834 N.W.2d 64 (Iowa 2013). Iowa has a "deflective appellate structure" whereby district-court decisions are appealed directly to the Iowa Supreme Court. State v. Effler, 769 N.W.2d 880, 883–84 (Iowa 2009); *see* IOWA CODE §§ 602.4102, 602.5103 (2014) (defining the jurisdiction of the Iowa Supreme Court and the Iowa Court of Appeals).

19. *Nelson*, 2012 WL 6652747, at *5.

20. *See, e.g.*, Doug Barry, *Iowa Supreme Court Says It Was Totally Cool for a Dentist To Fire His 'Irresistibly Attractive' Female Employee*, JEZEBEL, Dec. 22, 2012 ("In other words, a female employee in Iowa was fired because her boss found himself leering at her too often, and this incapacity to behave like a decent, professional human somehow, in the hothouse imagination of the Iowa Supreme Court, became *her* problem."); Rekha Basu, *Iowa Supreme Court Ruling in 'Too Irresistible' Case is an Embarrassment*, DES MOINES REGISTER, Dec. 29,

Six months later the Iowa Supreme Court took the unusual step of withdrawing its original opinion and granting a rehearing without oral argument.[21] The superseding opinion unanimously reaffirmed summary judgment in favor of Dr. Knight.[22] The court's analysis remained largely unchanged,[23] but it reframed the issue presented as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss's spouse views the relationship between the boss and the employee as a threat to her marriage."[24] The superseding opinion also included a special concurrence acknowledging that Nelson had stated a sex-discrimination claim but ultimately concluding that she was fired "because of the activities of her consensual personal relationship with her employer" and not because she was a woman.[25] Once again the decision received national media attention.[26]

In deciding *Nelson*, the Iowa Supreme Court relied upon the same analytical framework courts apply when interpreting Title VII.[27]

2012 ("The ruling so disregards core civil rights principles that it is hard to believe this same court made civil-rights history three years ago by ruling that gay people had a right to marry in Iowa.").

21. Order, *Nelson*, 2012 WL 6652747 (No. 11–1857); *see* Jeff Eckhoff, *Iowa Supreme Court Takes Another Look at 'Irresistible Employee' Case*, DES MOINES REGISTER BLOG (June 26, 2013, 1:45 PM), http://blogs.desmoinesregister.com/dmr/index.php/2013/06/26/iowa-supreme-court-pulls-back-decision-on-irresistible-employee-lawsuit-for-another-look/article (noting that a court spokesperson "called such situations 'rare' and said justices have granted a total of five petitions to rehear a case over the past decade"); *see also* Ryan Koopmans, *Iowa Supreme Court To Reconsider Case of "Irresistible Employee"*, ON BRIEF: IOWA'S APPELLATE BLOG (June 25, 2013), http://www.iowaappeals.com/iowa-supreme-court-to-reconsider-case-of-irresistible-employee (suggesting that the national response played a part in Nelson's decision to file a petition for rehearing).

22. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 73 (Iowa 2013).

23. The only significant change to the majority opinion beyond the sentence in which the holding appeared was the addition of a paragraph contrasting the circumstances presented in *Nelson* with those presented in an Eighth Circuit case reversing summary judgment in favor of an employer based on the plaintiff's allegation that she was fired because of her appearance. *Compare Nelson*, 834 N.W.2d at 71–72 (discussing Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033 (8th Cir. 2010)), *with Nelson*, 2012 WL 6652747, at *7 (omitting any discussion of appearance-based sex-discrimination precedents).

24. *Nelson*, 834 N.W.2d at 69. Note that this framing of the issue shifts the focus to the actions of Mrs. Knight.

25. *Id.* at 78 (Cady, C.J., concurring specially).

26. *See, e.g.*, Michael Kimmel, *Fired for Being Beautiful*, N.Y. TIMES, July 13, 2013, at A25; *20/20: The Naked Truth* (ABC television broadcast Aug. 2, 2013).

27. *Nelson*, 834 N.W.2d at 67 (Iowa 2013) (quoting Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 7 (Iowa 2009); Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 861 (Iowa 2001)). Recently, however, the Iowa Supreme Court clarified that federal antidiscrimination

The court interpreted Title VII case law to provide "that an employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a consensual relationship that has triggered personal jealousy," regardless of whether the jealousy would have existed had the employee been male.[28] Virtually all states have statutes banning sex discrimination in employment,[29] and these statutes are often interpreted in accordance with existing judicial interpretations of Title VII or other state antidiscrimination statutes.[30] Judges and advocates will likely cite Nelson for the proposition that it does not constitute sex discrimination for an employer to terminate an employee based on jealousy experienced by the employer's partner or spouse. Thus, although *Nelson* addressed a state civil rights claim, the case has broad implications with respect to an emerging question[31] in sex-discrimination jurisprudence—whether terminating an employee based on romantic jealousy constitutes unlawful sex discrimination.

This Note illustrates that Title VII should *not* be interpreted to support a general rule that terminations based on romantic jealousy are lawful. Part I briefly surveys the historical treatment of mixed-motive discrimination claims in the context of Title VII. Part II describes how courts have dismissed sex-discrimination claims arising in the romantic-jealousy context based on precedents concerning favoritism and romantic relationships. Setting aside the question of whether courts should rely on favoritism and romantic-relationship precedents in deciding romantic-jealousy claims, Part III defines jealousy and then relies on this definition to construct an affirmative argument that terminations resulting from romantic jealousy may constitute unlawful sex discrimination. Returning to the question set aside in Part III, Part IV critiques both the application of favoritism and romantic-relationship precedents to romantic-jealousy claims and

---

precedents are merely persuasive in interpreting the Iowa Civil Rights Act. Pippen v. State, 854 N.W.2d 1, 28 (Iowa 2014).

28. *Nelson*, 834 N.W.2d at 67; *see id.* at 67–72 (surveying and describing Title VII case law).

29. Mitchell Poole, *Paramours, Promotions, and Sexual Favoritism: Unfair, But Is There Liability?*, 25 PEPP. L. REV. 819, 828 (1998).

30. *See, e.g.*, *Nelson*, 834 N.W.2d at 67–72 (relying on federal appellate courts' interpretations of Title VII and a Michigan appellate court's interpretation of the Michigan Civil Rights Act in interpreting the Iowa Civil Rights Act).

31. For example, a sex-discrimination claim involving romantic jealousy is currently pending in New York. *See* Complaint, Dilek v. Nicolai, No. 160830/2013 (N.Y. Sup. Ct. Nov. 20, 2013).

Nelson's extension of the romantic-relationship rule to personal relationships.

I. A HISTORICAL OVERVIEW OF MIXED-MOTIVE ANALYSIS OF TITLE VII CLAIMS

Sex-discrimination claims based on romantic jealousy are properly classified as mixed-motive claims because they do not allege that sex was the only reason for an employment decision.[32] This Part briefly describes how Title VII came to prohibit discrimination based in part on sex and sketches the basic contours of the analytical framework applicable to such claims.

Title VII of the Civil Rights Act of 1964[33] made it unlawful for an employer to discharge an employee "because of" his or her sex or other protected characteristic.[34] Over time, a circuit split emerged concerning the proper interpretation of the phrase "because of." Some circuits stringently applied "but-for" analysis to Title VII claims, recognizing discrimination only when the plaintiff showed that an adverse employment decision would not have been made but for a protected characteristic.[35] For a female plaintiff to prevail on a sex-discrimination claim in these circuits, she had to establish that an adverse employment decision would not have been made if she had been a man.[36] By contrast, other circuits applied various forms of mixed-motive analysis to Title VII claims, recognizing discrimination when a plaintiff showed that a protected characteristic was a "substantial," "motivating," or "discernible" factor in an adverse employment decision.[37] In 1989, the Supreme Court legitimized

32. *See infra* Part III.A.

33. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

34. 42 U.S.C. § 2000e-2 (2012).

35. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n.2 (1989) (plurality opinion) (describing the approach taken in the Third, Fourth, Fifth, and Seventh Circuits whereby the plaintiff was required to show that but for the protected characteristic, the adverse employment decision would not have been made), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

36. *Id.*

37. *See id.* (describing the approaches taken in the First, Second, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits in which liability attached when a protected characteristic was a "substantial," "motivating," or "discernible" factor in an adverse employment decision so long as the employer did not prove that the same decision would have been made in the absence of discrimination).

mixed-motive analysis in *Price Waterhouse v. Hopkins*,[38] a case in which a plurality and two concurring Justices concluded that Title VII allows employers to be held liable for employment decisions motivated only in part by an unlawful motive.[39] This landmark decision resolved the Title VII debate among the circuits and clarified that Title VII prohibits employment decisions resulting from "both legitimate and illegitimate considerations."[40] Under *Price Waterhouse*, an employer could avoid liability for an employment decision motivated in part by an employee's protected characteristic only by demonstrating that the same decision would have been made even if the protected characteristic had not been considered.[41]

Price Waterhouse retained two important limits on courts' recognition of mixed-motive claims. First, recognition of mixed-motive claims was limited to cases in which a plaintiff demonstrated that an illegitimate motive was a "substantial factor in the particular employment decision."[42] Second, recognition of mixed-motive claims was limited based on whether the plaintiff presented direct or circumstantial evidence of discrimination. Mixed-motive claims that relied on "direct evidence" to show that a protected characteristic was a "substantial factor" in a contested employment decision were

38. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

39. *Id.* at 239–45 (plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring); *see* Thomas F. Kondro, Comment, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(m) of Title VII*, 54 ST. LOUIS U. L.J. 1439, 1442 & n.19 (2010) (observing that *Price Waterhouse* "legitimized the mixed-motive analysis, which previously had been rejected by some circuits in favor of a more stringent 'but-for' standard of causation"). Legislative history played a prominent role in the outcome. *See Price Waterhouse*, 490 U.S. at 239 & n.4, 241 & n.7, 243–44 & nn.8–9 (plurality opinion); *id.* at 262 (O'Connor, J., concurring). Most notably, Congress rejected an amendment that would have limited Title VII to prohibit only employment actions taken "solely because of" a protected characteristic. 110 CONG. REC. 2728 (1964).

40. *Price Waterhouse*, 490 U.S. at 247 (plurality opinion); *id.* at 239–45; *id.* at 259–60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).

41. *Id.* at 252 (plurality opinion). Following *Price Waterhouse*, most courts interpreted Justice O'Connor's concurrence as controlling. Kristina N. Klein, *Oasis or Mirage?* Desert Palace *and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1184 & n.58 (2006); David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 911 (2010); Kondro, *supra* note 39, at 1443. *But see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 188 (2009) (Stevens, J., dissenting) (arguing that Justice White's concurring opinion was "properly understood as controlling").

42. *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring).

evaluated using the framework articulated in *Price Waterhouse*.[43] By contrast, mixed-motive claims that relied on "circumstantial evidence" to show that an employment decision was motivated by a protected characteristic continued to be analyzed under the pretext framework applied to single-motive claims.[44] To prevail under that framework, an employee had to show either that the employer made the employment decision for a discriminatory reason or that any nondiscriminatory reason proffered by the employer was pretextual.[45] In practice, this meant that plaintiffs bringing mixed-motive claims that relied on circumstantial evidence rarely prevailed because they were unable to prove that employers' articulated reasons for employment decisions were pretextual.[46] In other words, even after *Price Waterhouse*, many mixed-motive claims failed because plaintiffs were rarely able to present "direct evidence"[47] that discriminatory animus was a "substantial factor" in an employment decision.[48]

Recognizing that *Price Waterhouse* would have the "inevitable effect" of permitting prohibited employment discrimination to escape

---

43. *Id.* at 276–79.

44. *Id.* at 278–79. *But see* Kondro, *supra* note 39, at 1443 & n.26 (suggesting that in practice the lower courts "categorically rejected" mixed-motive claims relying on circumstantial evidence without applying the pretext framework).

45. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973)).

46. *See* Michael A. Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 976 (1994) (describing how plaintiffs with only circumstantial evidence to support a mixed-motive claim "generally were unable to prove pretext because the defendant could articulate a 'legitimate, nondiscriminatory' reason"). By design, the pretext framework was intended to identify discrimination resulting from a single illegitimate motive. *See* Kondro, *supra* note 39, at 1448.

47. "Direct evidence" was not explicitly defined in *Price Waterhouse*, but the definition applied by Justice O'Connor strayed from the traditional definition. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 68 (1991); Steven M. Tindall, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 336, 343–44 (1996); Zubrensky, *supra* note 46, at 969. This resulted in disparity among the lower courts in interpreting the direct-evidence requirement. *Id.* at 970.

48. *See* Gabrielle R. Lamarche, *State of Employment Discrimination Cases After* Hicks, 32 SUFFOLK U. L. REV. 107, 111 & n.34 (1998) (observing that "direct evidence of discriminatory intent by an employer rarely exists"); T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 141 (2004) (noting that mixed-motive plaintiffs "rarely presented direct evidence of a discriminatory motive").

judicial sanction,[49] Congress responded by passing the Civil Rights Act of 1991[50] to amend Title VII.[51] As amended, Title VII provides that "an unlawful employment practice" is established once a plaintiff demonstrates that a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice."[52] Because the Civil Rights Act of 1991 abrogated *Price Waterhouse*, the Supreme Court subsequently held in *Desert Palace v. Costa*[53] that plaintiffs need not present direct or substantial evidence to obtain a motivating-factor jury instruction, effectively eliminating the *Price Waterhouse* limits on mixed-motive analysis.[54]

---

49. H.R. REP. NO. 102-40, pt. 1, at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584 ("The inevitable effect of the *Price Waterhouse* decision is to permit prohibited employment discrimination to escape sanction under Title VII."); *see* H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711 ("*Price Waterhouse* severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII.").

50. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

51. *See, e.g.*, Kondro, *supra* note 39, at 1444 ("Displeased by *Price Waterhouse*, Congress passed the Civil Rights Act of 1991 to supersede the Supreme Court's decision.").

52. 42 U.S.C. § 2000e-2(m) (2012).

53. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

54. *Id.* at 101–02; *see id.* at 98–100 (explaining that the Civil Rights Act of 1991 abrogated *Price Waterhouse*). Importantly, *Desert Palace* addressed appropriate jury instructions for mixed-motive claims rather than the appropriate framework for summary-judgment analysis. Many federal courts of appeals responded by fully or partially eliminating the direct-evidence requirement at the summary-judgment stage as well, but there remains a circuit split on the appropriate summary-judgment framework for mixed-motive claims. Only the Eighth Circuit has explicitly held that *Desert Palace* had "no impact" on summary-judgment analysis for mixed-motive claims. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). Four circuits permit plaintiffs pursuing mixed-motive claims to choose which framework is applied. Perez v. N.J. Transit Corp., 341 F. App'x 757, 761 (3d Cir. 2009); Fogg v. Gonzales, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007); Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004). The Sixth Circuit no longer applies the pretext framework in summary-judgment analysis of mixed-motive claims. White v. Baxter Healthcare Corp., 533 F.3d 381, 400–01 (6th Cir. 2008). And the Fifth Circuit allows plaintiffs with mixed-motive claims to avoid summary judgment by creating a genuine issue with respect to whether the articulated reason for an employment decision was pretextual or whether a protected characteristic was a motivating factor. Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004). Three circuits have declined to decide this question. *See* EEOC v. TBC Corp., No. 12–14341, 2013 WL 5433661, at *1 (11th Cir. Oct. 1, 2013) (noting that the court "need not decide" the appropriate summary-judgment framework for mixed-motive claims following *Desert Palace*); Semsroth v. City of Wichita, 304 F. App'x 707, 718 & n.11 (10th Cir. 2008) (noting that the court "need not resolve" whether *Desert Palace* required any modifications to the pretext framework ordinarily applied at the summary-judgment stage); Hillstrom v. Best W. TLC Hotel, 354 F.3d 27, 31 (1st Cir. 2003) (expressing doubt as to whether the question of the appropriate summary-judgment framework had been preserved but noting that even if the issue had been preserved "it would make no difference" to the outcome in the

Thus, Title VII currently provides that prohibited discrimination occurs whenever sex is a motivating factor in an employment decision, even if the same decision would have been made regardless of the employee's sex.[55] When an employer proves that he would have made the same decision absent the impermissible motivating factor, however, the employee is not eligible to receive compensatory damages.[56]

II. JUDICIAL RELIANCE ON FAVORITISM AND ROMANTIC-RELATIONSHIP PRECEDENTS IN ANALYSIS OF ROMANTIC-JEALOUSY CLAIMS

Few courts have considered sex-discrimination claims based on terminations resulting from romantic jealousy.[57] In the rare instances in which courts have considered such claims, they have generally refused to characterize the underlying employment decisions as sex discrimination.[58] This Part illustrates how precedents involving

---

case before the court). *Nelson* was an appeal from a decision granting summary judgment to the employer, but the suit was brought under the Iowa Civil Rights Act, not Title VII. Thus, the Iowa Supreme Court considered whether gender was a motivating factor in Nelson's termination without explicitly addressing the Eighth Circuit's conclusion that *Desert Palace* should not affect summary-judgment analysis of mixed-motive claims. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 67 (Iowa 2013).

55. 42 U.S.C. § 2000e-2(m) (2012); 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

56. 42 U.S.C. § 2000e-5(g)(2)(B) (limiting damages in discrimination actions brought under 42 U.S.C. § 2000e-2(m) to declaratory relief, injunctive relief, and attorney's fees when the employer demonstrates that the same action would have been taken "in the absence of the impermissible motivating factor").

57. This Note addresses sex-discrimination claims based on romantic jealousy, distinguishing these from claims based on envy. *See infra* notes 141–51 and accompanying text (describing the distinction between jealousy and envy and defining romantic jealousy). Although courts do not tend to explicitly distinguish between claims involving jealousy and envy, they consistently deny claims involving an employer who is envious of an employee's relationship with another person. *See, e.g.*, Blackshear v. Interstate Brands Corp., 495 F. App'x 613, 615, 617 (6th Cir. 2012) (affirming summary judgment in favor of an employer described as "jealous" when the employee showed that her supervisor was envious of her relationship with another employee); Bush v. Raymond Corp., 954 F. Supp. 490, 491–92, 498 (N.D.N.Y. 1997) (concluding that an employee's allegation that she was terminated because her supervisor was "jealous" of her relationship with another employee did not establish a prima facie case of sex discrimination); Barrett v. Kirtland Cmty. Coll., 628 N.W.2d 63, 67, 74 (Mich. Ct. App. 2001) (holding that "conduct based on romantic jealousy" did not constitute sex discrimination when an employee showed that his supervisor was envious of his relationship with another employee).

58. *See* Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 911 (8th Cir. 2006) (affirming summary judgment in favor of the defendant); Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 906 (11th Cir. 1990) (affirming judgment for the defendants); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 73 (Iowa 2013) (affirming summary judgment in favor of the defendants); *cf. Nelson*, 834 N.W.2d at 81 (Cady, C.J., concurring specially) ("Research has

favoritism and romantic relationships have played a role in this refusal by describing two leading cases involving romantic jealousy, *Platner v. Cash & Thomas Contractors, Inc.*[59] and *Tenge v. Phillips Modern Ag Co.*[60] It then examines the Iowa Supreme Court's reliance on *Platner* and *Tenge* in concluding that Melissa Nelson's termination was lawful.

A. Judicial Reliance on Favoritism Precedents

Courts generally decline to recognize sex-discrimination claims when preferential treatment of one employee due to nepotism or favoritism resulted in another employee suffering an adverse employment action.[61] Courts apply this general rule even in cases in which an adverse employment action resulted from sexual favoritism,[62] a form of favoritism that typically involves an employer

---

failed to uncover any appellate court in the nation that has recognized sex discrimination under facts similar to those in this case."). *But see* Lococo v. Barger, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision) (reversing a district court's grant of summary judgment to a plaintiff who alleged that she was terminated based on the jealousy of her supervisor's wife).

59. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902 (11th Cir. 1990).

60. Tenge v. Phillips Modern Ag Co., 446 F.3d 903 (8th Cir. 2006).

61. *See, e.g.*, Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002) ("Whether the employer grants employment perks to an employee because she is a protegé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification."). *But see* Domingo v. New England Fish Co., 445 F. Supp. 421, 436 (W.D. Wash. 1977) ("Although Title VII does not prohibit nepotism as such, it prohibits nepotism when it results in discrimination." (citing Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 1268 (9th Cir. 1976))), *aff'd*, 727 F.2d 1429 (9th Cir. 1984), *modified*, 742 F.2d 520 (9th Cir. 1984).

62. The position of the Equal Employment Opportunity Commission (EEOC) is that "isolated instances of preferential treatment based upon consensual romantic relationships" are not prohibited by Title VII, whereas favoritism based on coerced conduct may constitute quid pro quo harassment and widespread favoritism may constitute hostile-environment harassment. U.S. EEOC, NOTICE NO. 915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html. These guidelines are not mandatory. Stephen Dacus, Miller v. Department of Corrections*: The Application of Title VII to Consensual, Indirect Employer Conduct*, 59 OKLA. L. REV. 833, 842 (2006) ("EEOC regulations are not controlling authority." (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975))). Nonetheless, most circuits have declined to recognize sex discrimination in the context of sexual favoritism. Duncan v. Cnty. of Dakota, 687 F.3d 955, 959 (8th Cir. 2012); Wilson v. Delta State Univ., 143 F. App'x 611, 614 (5th Cir. 2005) (citing Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 382 (5th Cir. 2003)); *Schobert*, 304 F.3d at 733 (citing DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 306 (2d Cir. 1986)); Womack v. Runyon, 147 F.3d 1298, 1300–01 (11th Cir. 1998) (per curiam); Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1370 (10th Cir. 1997); Becerra v. Dalton, 94 F.3d 145, 149–50 (4th Cir. 1996); *DeCintio*, 807 F.2d at 308; Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 501 (W.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988). In addition, some states have declined to

favoring an employee with whom he or she[63] has a sexual or romantic relationship.[64] One rationale for refusing to recognize favoritism claims is that when an employer favors one employee, every other employee is equally disadvantaged regardless of his or her sex.[65] Consequently, favoritism does not necessarily suggest the existence of an invidious motive toward either sex.[66] Another rationale is that Title VII prohibits differentiation based on "sex" but not differentiation based on sexual, familial, or other relationships.[67]

In the typical romantic-jealousy case, an employer becomes aware that his or her spouse is jealous of a particular employee and consequently terminates that employee. This bears some resemblance to the typical sexual-favoritism case described above in that the employer terminates the employee while considering the interests of a person with whom he or she has a preexisting romantic relationship—typically the employer's spouse or romantic partner. It is therefore unsurprising that courts have acknowledged that Title

---

recognize sexual-favoritism claims. Poole, *supra* note 29, at 845 (citing Herman v. W. Fin. Corp., 869 P.2d 696, 701–03 (Kan. 1994); Erickson v. Marsh & McLennan Co., 569 A.2d 793, 801–03 (N.J. 1990)).

63. Some examples and hypothetical scenarios in this Note utilize gendered pronouns. For clarity and consistency, the gender of employer and employee in these examples remains consistent with the gender of the employer and employee in *Nelson*.

64. Dacus, *supra* note 62, at 833; Poole, *supra* note 29, at 819 n.2.

65. *See, e.g.*, Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 656 n.6 (5th Cir. 2002) ("[F]avoritism, while unfair, disadvantages both sexes alike for reasons other than gender.")

66. *See, e.g.*, Preston v. Wis. Health Fund, 397 F.3d 539, 541 (7th Cir. 2005) ("Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination.").

67. *See, e.g.*, Holder v. City of Raleigh, 867 F.2d 823, 826 (4th Cir. 1989) ("The list of impermissible considerations . . . is both limited and specific: 'race, color, religion, sex or national origin.' We are not free to add our own considerations to the list."); *see also Taken*, 125 F.3d at 1369–70 ("Title VII's reference to 'sex' means a class delineated by gender, rather than sexual affiliations."); *DeCintio*, 807 F.2d at 306–07 ("The proscribed differentiation under Title VII . . . must be a distinction based on a person's sex, not on his or her sexual affiliations." (citing L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978); *Meritor*, 477 U.S. at 64)). Nonetheless, there is typically at least some causal connection between gender and employment actions based on sexual favoritism because the favored employee's gender corresponds to the supervisor's sexual preference for a particular gender. *See* Poole, *supra* note 29, at 832 ("Given that sexual favoritism is based first upon a supervisor's attraction to a particular gender, a causal connection exists between the supervisor's subsequent actions, gender, and who gets harmed.").

VII does not prohibit employment decisions based on favoritism in deciding romantic-jealousy claims.[68]

But courts have dismissed romantic-jealousy claims based on their similarity to favoritism claims rather than simply acknowledging these similarities. For example, in *Platner v. Cash & Thomas Contractors*, the Eleventh Circuit relied on the rule that Title VII does not prohibit favoritism to dismiss a romantic-jealousy claim.[69] In *Platner*, the employer's spouse was not jealous of the terminated employee.[70] Rather, his daughter-in-law suspected that the employee and *her* husband (the employer's son) were having an affair.[71] The employer terminated the employee because his daughter-in-law had become "extremely jealous."[72] The record did not reflect whether the alleged affair had actually occurred.[73]

The court recognized that there was no basis for concluding that the termination was based on the employee's performance or workplace conduct.[74] The employee had socialized with her coworkers, but the court concluded that although "not entirely prudent," such actions were "basically blameless."[75] The court emphasized, however, that the trial judge had criticized the conduct of the employer's son and daughter-in-law by finding that he fueled his wife's jealousy and responded abusively to her accusations and that she possessed "a heightened sense of need to protect her marital interest."[76]

The Eleventh Circuit described the question presented as whether, under such circumstances, "personal, family-related reasons . . . constitute a legitimate, nondiscriminatory basis" for terminating an employee under Title VII.[77] The court characterized

68. *See, e.g.*, Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908–09 (8th Cir. 2006) (describing the rule derived from sexual-favoritism precedents in considering a sex-discrimination claim arising in the context of jealousy).

69. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902 (11th Cir. 1990).

70. *Id.* at 903–04.

71. *Id.* at 903.

72. *Id.*

73. *Id.* at 903–04.

74. *Id. But see* Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 909 (8th Cir. 2006) (citing *Platner* in a discussion about terminations involving consensual sexual conduct); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 76 (Iowa 2013) (Cady, C.J., concurring specially) (suggesting that the employee in *Platner* was fired due to sexually suggestive conduct).

75. *Platner*, 908 F.2d at 903 (quotation marks omitted).

76. *Id.*

77. *Id.* at 904.

the employer as having faced "a choice as to which employee to keep" and suggested that, in making that choice, the employer had reasonably "opted to place the burden of resolving the situation" on an unrelated employee rather than his son.[78] Consequently, the court concluded that the "ultimate basis" for the employer's decision "was not gender but simply favoritism for a close relative."[79] Having determined that the termination was due to "personal, family-related reasons," the court held that termination was not actionable because Title VII does not prohibit favoritism toward relatives.[80]

B. Judicial Reliance on Romantic-Relationship Precedents

Courts consistently refuse to recognize sex-discrimination claims when an employee has participated in a consensual sexual or romantic relationship with an employer.[81] The primary rationale for this rule is that Title VII prohibits employment decisions "based on a person's sex, but not based on his or her sexual affiliations."[82] A second rationale is that Title VII does not prohibit employment decisions based on feelings unmotivated by any protected characteristic.[83] This rationale is distinguishable from the primary

78. *Id.* at 905.

79. *Id.*

80. *Id.* at 904, 905–06 (citing Holder v. City of Raleigh, 867 F.2d 823, 825–26 (4th Cir. 1989)).

81. *See, e.g.*, Benders v. Bellows & Bellows, 515 F.3d 757, 768 (7th Cir. 2008) ("Essentially, Benders complains of being discriminated against not because of her sex, but because of her consensual sexual relationship with Mr. Bellows. We agree that these allegations are insufficient to support a cause of action for sex discrimination." (citing Kahn v. Objective Solutions, Int'l, 86 F. Supp. 2d 377, 380 (S.D.N.Y. 2000); Huebschen v. Dep't of Health and Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983))); *see also* Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1370 (10th Cir. 1997) (declining to recognize sex-discrimination claims based on "consensual romantic involvements"); DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986) (holding that "voluntary, romantic relationships cannot form the basis of a sex discrimination suit"); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 75 (Iowa 2013) (Cady, C.J., concurring specially) ("What has emerged from this complex area of the law is the general legal principle that an adverse employment consequence experienced by an employee because of a voluntary, romantic relationship does not form the basis of a sex-discrimination suit." (citing *Kahn*, 86 F. Supp. 2d at 382)).

82. *DeCintio*, 807 F.2d at 306–07 ("The proscribed differentiation under Title VII . . . must be a distinction based on a person's sex, not on his or her sexual affiliations.").

83. *See, e.g.*, Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 343 (6th Cir. 1998) ("[P]ersonal conflict does not equate with discriminatory animus."); McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986) ("Personal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII."); Keppler v. Hinsdale Twp. High Sch. Dist. 86, 715 F. Supp. 862, 869 (N.D. Ill. 1989) (applying a rebuttable presumption that termination following a failed

rationale for the rule in that it presumes that employment decisions made in the context of sexual or romantic relationships are motivated by the employer's feelings toward the employee rather than the employee's actions or sexual orientation. Finally, a third rationale is that the employee who is romantically involved with an employer elects to extend the workplace relationship into the private realm, where the prohibitions of Title VII no longer apply.[84] Courts do not hesitate to apply the romantic-relationship rule to dismiss sex-discrimination claims, including those based on jealousy arising in the context of sexual relationships.[85]

The rule that Title VII does not prohibit terminations in the context of romantic relationships was extended to deny a claim based on jealousy arising in the context of sexually suggestive employee conduct in the Eighth Circuit case *Tenge v. Phillips Modern Ag Co.*[86] The employer and employee in *Tenge* were not engaged in a sexual relationship, but the employee acknowledged that she had engaged in sexually suggestive conduct.[87] For example, she and her employer had pinched each other's buttocks in the employer's wife's presence, and she had left sexually suggestive notes for her employer in places where others could see them.[88] The employee acknowledged that this suggestive behavior could have caused her employer's wife to believe that she had an intimate relationship with her employer, and the wife did in fact suspect that such a relationship existed and was concerned that the employee may have been attempting to seduce her husband.[89] The employer eventually terminated the employee, explaining to her

---

relationship is "the result not of sexual discrimination, but of responses to an individual because of her former intimate place in her employer's life").

84. *See Keppler*, 715 F. Supp. at 869 ("An employee who chooses to become involved in an intimate affair with her employer . . . removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting."); *Nelson*, 834 N.W.2d at 76 (Cady, C.J., concurring specially) (pointing out "the practical change in an employment relationship that occurs when a relationship extends beyond the workplace").

85. *See, e.g.*, *Kahn*, 86 F. Supp. 2d at 378–79, 382 (dismissing the claim of an employee who was terminated at the insistence of her employer's wife because the employee had a consensual sexual relationship with the employer); Campbell v. Masten, 955 F. Supp. 526, 528, 529 (D. Md. 1997) (dismissing the claim of an employee who alleged that she was perceived to be a threat to her employer's marriage based on her prior sexual relationship with her employer).

86. Tenge v. Phillips Modern Ag Co., 446 F.3d 903 (8th Cir. 2006).

87. *Id.* at 906.

88. *Id.*

89. *Id.*

that his wife had made him choose between his "best employee or her and the kids."[90]

The employee filed suit on the theory that "arousing the jealousy of the boss's wife is an illegal criterion for discharge under Title VII."[91] The Eighth Circuit noted that the court was not presented with a situation in which an employee had not engaged in sexually suggestive behavior and was "terminated simply because an employer or supervisor's spouse perceive[d] the employee to be a threat."[92] On the contrary, the question presented was whether "termination on the basis of an employee's admitted, consensual sexual conduct with a supervisor" violates Title VII.[93] The court was careful to point out that the touching and the notes distinguished the employee's actions from the "general sexual banter" that took place among other employees.[94]

The Eighth Circuit closely examined the relationship between sexual conduct and sexual favoritism, noting that sexual favoritism occurs when one employee receives favorable treatment relative to other employees based on a "consensual relationship" with the employer.[95] The court concluded that the relevant principle to be taken from sexual-favoritism precedents is that when "an employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct, Title VII is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee."[96] Turning to precedents in which employees were treated *less* favorably than others based on consensual sexual conduct, the Eighth Circuit described several courts as having concluded that "terminating an employee based on the employee's consensual *sexual conduct* does not violate Title VII."[97] But the court based this observation primarily

90. *Id.*

91. *Id.* at 907.

92. *Id.*

93. *Id.*

94. *Id.* at 910.

95. *Id.* at 908–09.

96. *Id.* at 909.

97. *Id.* (emphasis added) (citing Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 903, 905 (11th Cir. 1990); Kahn v. Objective Solutions, Int'l, 86 F. Supp. 2d 377, 382 (S.D.N.Y. 2000); Campbell v. Masten, 955 F. Supp. 526, 529 (D. Md. 1997); Freeman v. Cont'l Technical Serv., Inc., 710 F. Supp. 328, 331 (D. Ga. 1988)).

on cases involving consensual sexual *relationships*[98] that were properly dismissed based on the traditional rule that Title VII does not prohibit terminations resulting from romantic relationships.[99]

The Eighth Circuit ultimately concluded that Title VII does not prohibit terminations resulting from an "employee's admitted consensual sexual conduct with an employer" and held that the termination did not constitute sex discrimination.[100] The court emphasized the employer's desire to calm his wife following the employee's admitted sexual conduct and found this to be the "ultimate basis" for the termination.[101]

The Eighth Circuit's decision in *Tenge* extended the romantic-relationship rule to encompass not only terminations based on sexual or romantic relationships, but also those based on sexually suggestive employee conduct.[102] But the Eighth Circuit declined to address whether terminating an employee because she is perceived to threaten a marriage would constitute unlawful discrimination if the employee has not engaged in sexually suggestive conduct.[103]

C. *Judicial Reliance on Favoritism and Romantic-Relationship Precedents in* Nelson

When *Nelson* was decided, *Platner* and *Tenge* were the leading cases involving sex-discrimination claims arising from romantic jealousy. Predictably, the Iowa Supreme Court relied on *Platner* and *Tenge* in dismissing Melissa Nelson's claim, but the court characterized both cases as dismissing sex-discrimination claims based on favoritism precedents. Under the *Nelson* court's analysis, the "unstated reasoning" in *Tenge* was that "if a specific instance of sexual *favoritism* does not constitute gender discrimination, treating an employee *unfavorably* because of such a relationship does not violate the law either."[104] Similarly, the court endorsed the view that the employer in *Platner* had acted based on "favoritism for a close

98. *Id.* at 909.
99. *See supra* note 81 and accompanying text.
100. *Tenge*, 446 F.3d at 909–10.
101. *Id.* at 910.
102. *Id.*
103. *Id.* at 910 n.5.
104. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 67–68 (Iowa 2013).

relative" because he chose to burden an unrelated employee rather than an employee who was also a relative.[105]

The *Nelson* majority repeatedly emphasized that Dr. Knight's wife perceived Nelson to be a threat to her marriage.[106] The court recalled the circumstances that led to Mrs. Knight's demand for Nelson's termination, including her discovery that Dr. Knight had texted Nelson while vacationing with their children[107] and her perception that Nelson was flirtatious with Dr. Knight and cold toward her.[108] Mrs. Knight also believed that Nelson liked being alone in the office with Dr. Knight after hours, and she thought it "strange that after being at work all day and away from her kids and husband [Nelson was not] anxious to get home like the other [women] in the office."[109]

In describing the interactions between Nelson and Dr. Knight, the court focused on conduct that could suggest that the two had something other than an ordinary working relationship. The court recounted that during the final six months of Nelson's employment she and Dr. Knight began texting each other about work matters and innocuous personal matters.[110] In particular, the court recalled that in a moment of frustration with a coworker, Nelson once sent Dr. Knight a text saying he was the "only reason" she continued to work in the office.[111] The court also focused on the suggestive nature of texts sent by Dr. Knight.[112] For example, Dr. Knight once sent Nelson

105. *Id.* at 69 & n.4 (quoting Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 (11th Cir. 1990)).

106. *Id.* at 66, 67, 69, 71.

107. *Id.* at 66.

108. *Id*. Nelson denied flirting with Dr. Knight or desiring an intimate or sexual relationship with him. *Id.* at 65.

109. *Id.* at 66 (second alteration in original); *id.* at 71 n.5. The court explicitly acknowledged that "in isolation, this statement could be an example of a gender-based stereotype" but apparently concluded that it did not constitute a stereotype because it "was linked to a specific concern about Nelson's relationship with [Dr. Knight]." *See id.*

110. *Id.* at 65–66. The court noted that both Dr. Knight and Nelson were parents and "some of the texts involved updates on the kids' activities and other relatively innocuous matters." *Id.* at 65.

111. *Id.* at 66; *id.* at 78 (Cady, C.J., concurring specially).

112. *Id.* at 66 (majority opinion). The concurring justices described the texts as being "an undeniable part of the consensual personal relationship enjoyed by Nelson and Dr. Knight" that "revealed a relationship that was much different than would reasonably be expected to exist between employers and employees in the workplace." *Id.* at 78 (Cady, C.J., concurring specially).

a text inquiring how frequently she orgasmed.[113] Although the justices acknowledged that Nelson did not reply, they emphasized that she could "not remember ever telling Dr. Knight not to text her or telling him that she was offended."[114] On another occasion, Dr. Knight sent Nelson a text indicating that her shirt was too tight,[115] and Nelson replied that "she did not think he was being fair"[116] because he did not react the same way when other employees "really did wear tight, revealing, and inappropriate clothing."[117] Dr. Knight responded that "it was a good thing Nelson did not wear tight pants too because then he would get it coming and going."[118] Nelson denied that her clothing was inappropriate, but she testified that Dr. Knight occasionally complained that her clothing was "distracting."[119] Dr. Knight admitted that he once told her that if his pants were "bulging," that meant her clothing was "too revealing."[120] In a separate incident, Dr. Knight mentioned an article he had read suggesting that frequent sex helps prevent prostate cancer, and Nelson replied with a comment suggesting that she had sex infrequently.[121] Dr. Knight admitted that he responded by telling her that was "like having a Lamborghini in the garage and never driving it."[122]

Presumably due to the procedural posture of Nelson's appeal,[123] the Iowa Supreme Court credited her assertion that she was not fired due to her own conduct and described the issue before the court as the one left open in *Tenge*.[124] Specifically, the court framed the

113. *Id.*

114. *Id.* at 66 (majority opinion).

115. *Id.*; *id.* at 78 (Cady, C.J., concurring specially).

116. *Id.* at 66 (majority opinion).

117. Joint Appendix, *supra* note 1, at 99.

118. *Nelson*, 834 N.W.2d at 66; *id.* at 78 (Cady, C.J., concurring specially).

119. *Id.* at 65 n.3 (majority opinion). Nelson typically wore scrubs at the office, but she sometimes removed her lab coat to reveal a fitted long-sleeve crewneck t-shirt or changed into workout clothes before heading to the gym. Joint Appendix, *supra* note 1, at 43, 62, 70, 99, 122–23, 129, 133.

120. *Nelson*, 834 N.W.2d at 66.

121. *See* Joint Appendix, *supra* note 1, at 115, 127 (describing the context in which Nelson made the statement about infrequency in her sex life).

122. *Nelson*, 834 N.W.2d at 66.

123. *Id.* at 65 ("Because this case was decided on summary judgment, we set forth the facts in the light most favorable to the plaintiff, Melissa Nelson.").

124. *See id.* at 68–69 (quoting Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 910 n.5 (8th Cir. 2006)) (noting that Nelson claimed that she "did not do anything to get herself fired except exist as a female" and argued that this distinguished her situation from that of the employee in *Tenge*).

question presented as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss's spouse views the relationship between the boss and the employee as a threat to her marriage."[125] In answering that question, the court characterized federal case law derived from the context of consensual *sexual* relationships as yielding the principle that an "adverse employment action stemming from a consensual *workplace* relationship . . . is not actionable under Title VII" because "an isolated employment decision based on personal relations . . . is driven entirely by individual feelings and emotions regarding a specific person" and is not based on "factors that might be a proxy for gender." [126] The court determined that the same principle applied to Nelson's claim because Nelson had a "personal relationship" with Dr. Knight[127] that was "consensual."[128]

The Iowa Supreme Court ultimately held that an employer who terminates an employee because his wife is "concerned about the nature of the *relationship* between the employer and employee" has not committed unlawful sex discrimination.[129] The court dismissed the argument that an employer should not be able to avoid liability for discrimination by terminating an employee "to *avoid* committing sexual harassment," reasoning that sexual harassment *creates* a hostile atmosphere, whereas terminating an employee to *avoid* harassing her "by definition does not bring about that atmosphere."[130] The court also dismissed the argument that denying discrimination claims based on jealousy in the absence of "employee misconduct" would allow employers to avoid liability for discrimination simply by claiming to have jealous spouses, reasoning that employees could still prevail by showing that jealousy was a pretext for a decision based on gender.[131] Though the court acknowledged that an assessment that Nelson failed to conform to a gender stereotype might have supported her claim, it

125. *Id.* at 69.

126. *Id.* at 70 (emphasis added) (citing Benders v. Bellows & Bellows, 515 F.3d 757, 768 (7th Cir. 2008); Blackshear v. Interstate Brands Corp., 495 F. App'x 613, 617 (6th Cir. 2012); West v. MCI Worldcom, Inc., 205 F. Supp. 2d 531, 544–45 (E.D. Va. 2002)).

127. *See id.* (citing *Tenge*, 446 F.3d at 905–06) (describing *Nelson* as being like *Tenge* in that it involved "a personal relationship between the owner of a small business and a valued employee of the business that was seen by the owner's wife as a threat to their marriage.")

128. *Id.* at 65, 70, 72.

129. *Id.* at 65 (emphasis added).

130. *Id.* at 72 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 786–90 (1998)).

131. *Id.* at 70–71.

suggested that the existence of a "personal relationship" between her and Dr. Knight eliminated any possibility that a gender stereotype had motivated her termination.[132]

Given that romantic jealousy by definition involves concern about the nature of a relationship,[133] *Nelson* strongly suggests that a termination resulting from romantic jealousy can never support a sex-discrimination claim.[134] But the majority opinion was supplemented by a special concurrence intended "to further explain the basis and rationale for the decision" that reinforced the centrality of the "personal relationship" between Nelson and Dr. Knight to the court's analysis.[135] The concurrence clarified that "Nelson was terminated because of the activities of her consensual personal relationship with her employer, not because of her gender" and suggested that whether a personal relationship existed was properly determined based on the conduct of both parties.[136] Looking to the conduct of Nelson and Dr. Knight, the concurring justices explained that the record reflected "enough activity and conduct to support a determination as a matter of law that Nelson was terminated as a response to the consensual personal relationship she maintained with Dr. Knight."[137] They reasoned that although Dr. Knight's sexual comments were inappropriate for the workplace, "they nevertheless were an undeniable part of the consensual personal relationship enjoyed by Nelson and Dr. Knight."[138] Moreover, even if Nelson was terminated because Dr. Knight was physically attracted to her, her termination

132. *See id.* at 71–72 (concluding that "the critical difference" between *Nelson* and a case in which an employee was terminated for her failure to conform with gender stereotypes was that "Nelson indisputably lost her job because Dr. Knight's spouse objected to the parties' *relationship*"). The court acknowledged that Mrs. Knight's statement that she found it "strange that after being at work all day and away from her kids and husband [Nelson was not] anxious to get home like the other [women] in the office" might have been an example of a gender stereotype. *Id.* at 71 n.5. It concluded, however, that the statement was not a stereotype because it "was linked to a specific concern" by Mrs. Knight about the relationship between Nelson and her husband. *Id.* at 66, 71 n.5.

133. *See infra* Part III.A.

134. *See Nelson*, 834 N.W.2d at 65 (concluding that an employer may terminate an employee because his spouse, "due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee").

135. *Id.* at 73 (Cady, C.J., concurring specially).

136. *Id.* at 78.

137. *Id.* at 79–80.

138. *Id*. at 78.

did not constitute sex discrimination because his attraction "surfaced during and resulted from the personal relationship."[139]

III. ANALYZING ROMANTIC JEALOUSY AS A BASIS FOR SEX-DISCRIMINATION CLAIMS

Setting aside the question of whether it is appropriate for courts to rely on favoritism and romantic-relationship precedents to foreclose romantic-jealousy claims, the question remains whether an affirmative argument can be made that terminations resulting from jealousy constitute unlawful sex discrimination.[140] This Part attempts to answer that question. It begins by defining romantic jealousy and explaining why mixed-motive analysis is the appropriate framework for determining whether a particular termination resulting from romantic jealousy constitutes unlawful discrimination. It then considers the form that analysis should take and concludes that determining whether unlawful discrimination has occurred necessarily depends on the circumstances giving rise to romantic jealousy.

A. Selecting the Appropriate Framework for Romantic-Jealousy Claims

Philosophers[141] and social scientists[142] have long distinguished between jealousy and envy, though courts[143] and laypersons[144] tend to

139. *Id.* at 79.

140. Note that like the opinions in *Platner* and *Tenge*, the *Nelson* opinion does not discuss whether there may be an affirmative argument for recognizing romantic-jealousy claims in the absence of precedents involving favoritism or relationships. All three opinions address the question of whether gender actually motivated the defendant–employer to terminate the plaintiff–employee in a conclusory manner. *See* Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 910 (8th Cir. 2006) ("The ultimate basis for Tenge's dismissal was not her sex, it was Scott's desire to allay his wife's concerns over Tenge's admitted sexual behavior with him."); Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 (11th Cir. 1990) ("It is thus clear that the ultimate basis for Platner's dismissal was not gender but simply favoritism for a close relative."); *Nelson*, 834 N.W.2d at 71–72 (majority opinion) (describing Nelson's termination as resulting from the fact that Mrs. Knight, "unfairly or not, viewed her as a threat to her marriage" and objected to her relationship with Dr. Knight).

141. W. Gerrod Parrott & Richard H. Smith, *Distinguishing the Experiences of Envy and Jealousy*, 64 J. PERSONALITY & SOC. PSYCHOL. 906, 906 (1993) ("Philosophers from ancient times to the present have argued that envy and jealousy have distinct causes and experiences." (citations omitted)); *see generally* Luke Purshouse, *Jealousy in Relation to Envy*, 60 ERKENNTNIS 179 (2004) (surveying philosophical models distinguishing between jealousy and envy).

142. Parrott & Smith, *supra* note 141, at 906 (observing that many social psychologists and other social scientists distinguish between jealousy and envy).

use the terms interchangeably.[145] Envy occurs when one experiences feelings such as inferiority, resentment, or ill will[146] because one lacks and desires to possess something another person has.[147] In contrast, jealousy occurs when a person experiences emotions such as apprehension, anxiety, and fear concerning the potential loss of something already possessed to another person.[148] In other words, envy stems from the desire to get what someone else has, whereas jealousy stems from the desire to keep what one already has.[149] Romantic jealousy is a particular form of jealousy in which what one desires to retain is a romantic relationship.[150] Thus, romantic jealousy occurs when one person perceives another person to be a romantic rival who threatens an existing romantic relationship.[151]

---

143. *See, e.g.*, Blackshear v. Interstate Brands Corp., 495 F. App'x 613, 615, 617 (6th Cir. 2012) (describing evidence suggesting that an employer was envious as supporting the conclusion that the employer was jealous); Barrett v. Kirtland Cmty. Coll., 628 N.W.2d 63, 67, 74 (Mich. Ct. App. 2001) (referring to conduct resulting from envy as "conduct based on romantic jealousy"). At least one legal commentator has also observed the distinction. Jane Tucker, Note, *Taming the Green-Eyed Monster: On the Need To Rethink Our Cultural Conception of Jealousy*, 25 YALE J.L. & FEMINISM 217, 224 (2013).

144. Peter Salovey & Judith Rodin, *The Differentiation of Social-Comparison Jealousy and Romantic Jealousy*, 50 J. PERSONALITY & SOC. PSYCHOL. 1100, 1100 (1986). *But see* Parrott & Smith, *supra* note 141, at 906 (observing that research suggests that laypersons implicitly recognize the distinction between jealousy and envy).

145. Nonetheless, Homer Simpson accurately captured the distinction in an episode of the *The Simpsons*: "Jealousy is when you worry someone will take what you have. Envy is wanting what someone else has. What I feel is envy." *The Simpsons: Covercraft* (FOX television broadcast Nov. 23, 2014).

146. Parrott & Smith, *supra* note 141, at 906.

147. Salovey & Rodin, *supra* note 144, at 1100 (citing Philip M. Spielman, *Envy and Jealousy: An Attempt at Clarification*, 40 PSYCHOANALYTIC Q. 59, 59–82 (1971)).

148. Parrott & Smith, *supra* note 141, at 906–07; Salovey & Rodin, *supra* note 144, at 1100, 1112.

149. Complicating this distinction is the fact that envy and jealousy may occur simultaneously arising out of the same set of circumstances. *See* Parrott & Smith, *supra* note 141, at 907 ("When a person's romantic partner gives attention to an attractive rival, that person may both be jealous of the special relationship with the partner and also envious of the rival for being so attractive.").

150. Salovey & Rodin, *supra* note 144, at 1100.

151. *Id.* at 1112 ("When one's relationship with another person is threatened by a rival . . . one experiences romantic jealousy as one imagines the loss of that relationship . . . ."); *see also* Stacie Y. Bauerle, James H. Amirkhan & Ralph B. Hupka, *An Attribution Theory Analysis of Romantic Jealousy*, 26 MOTIVATION & EMOTION 297, 310 (2002) ("The function of romantic jealousy may be viewed as a guardian of relationships. It is ignited by the jealous individual's perception that the romantic partner's interest in the rival poses a threat to the primary relationship.").

The above description reveals the chief difficulty with sex-discrimination claims involving jealousy: jealousy is not necessarily premised on biological sex or gender.[152] Because sex and jealousy may be disaggregated in this way, jealousy does not constitute an inherently discriminatory basis for an employment decision. Recall that under the framework applicable to single-motive claims, an employee must demonstrate either that a protected characteristic was the reason for an employment decision or that the employer's proffered nondiscriminatory reason for the decision was pretextual.[153] Once an employee demonstrates that jealousy would not have occurred but for her gender, an employer can rely on garden-variety jealousy as a legitimate nondiscriminatory reason for an employment decision because it is not inherently gendered.[154]

One might be tempted to argue that the essential feature of romantic jealousy—the perception of a threat to an existing romantic relationship—supplies an adequate basis for recognizing that a resulting employment decision is inherently discriminatory. This argument recognizes that when a person believes her romantic partner has an exclusive sexual preference, that belief probably influences the likelihood that she will experience jealousy toward a specific rival.[155] It assumes that under such circumstances biological sex or gender represents the dividing line between those she perceives to be potential romantic rivals and those she does not. This assumption translates to a claim that an employment decision based on romantic jealousy is inherently discriminatory when the employer is attracted exclusively to one biological sex or gender—a claim premised on the assumption that when an employer has an exclusive

152. For example, consider the following scenario. An office manager works in an office with her employer–husband, but she senses that he would prefer another employee with more accounting experience to be the office manager. She knows that having two employees devoted to office management is not feasible, given the size of the office. Fearing that she might lose the position if she does not act, she asks her employer–husband to fire the other employee because she is jealous. The employer–husband acquiesces and terminates the employee. This termination resulted from jealousy, but it was completely unrelated to the terminated employee's gender. In fact, the gender of the terminated employee was not even specified in this example.

153. *See supra* note 45 and accompanying text.

154. *See supra* note 152 and accompanying text.

155. *Cf.* Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 75 n.9 (Iowa 2013) (Cady, C.J., concurring specially) (implying that sexuality plays a role in romantic jealousy by emphasizing that the case was evaluated in the context of heterosexual relationships).

sexual preference, romantic jealousy would not have occurred but for the gender of the terminated employee.

The argument that an employment decision based on romantic jealousy is inherently discriminatory is problematic and unpersuasive. The difficulties arise primarily because the argument proceeds from the premise that the employer has an exclusive sexual orientation. From a normative perspective, undesirable consequences flow from relying on the sexual orientation of the employer to provide the causal link between sex and an employment decision. Such reliance implies that some employees, namely those terminated by bisexual employers, are entitled to less protection from employment-discrimination laws than others.[156] But practical difficulties would likely result from linking recognition of romantic-jealousy claims to the sexual orientation of employers. For example, parties might debate which classification best fits a particular employer or what the outcome should be if the spouse's perception of an employer's sexuality does not perfectly align with his past sexual behavior.

From a doctrinal perspective, because the argument that romantic jealousy is inherently discriminatory implies that sex and romantic jealousy cannot be disaggregated, it suggests that the appropriate framework for analysis of romantic-jealousy claims is the pretext framework applicable to single-motive claims.[157] Under this framework, however, an employer could claim that his desire to alleviate jealousy experienced by his romantic partner constituted a legitimate nondiscriminatory reason for terminating an employee. To prove that the employer's articulated nondiscriminatory reason was pretextual would require the employee to undermine the very basis for her claim. Consequently, the argument that romantic jealousy is inherently based on sex does not function effectively as an argument in favor of recognizing that romantic jealousy may be a discriminatory basis for an employment decision.

Further analysis illuminates why courts *should* be skeptical of the argument that romantic jealousy is inherently premised on sex. Assume for a moment that gender and sexual preference must align in order to cause jealousy. Though such alignment may be *necessary* to trigger romantic jealousy, it may not be *sufficient* to do so. For example, a woman married to a heterosexual man may experience

156. *Cf. id.* ("Both Nelson and Dr. Knight are married to opposite-sex spouses, and this case is evaluated in that context.").

157. *See supra* note 45 and accompanying text.

romantic jealousy toward *only* women,[158] but she will not necessarily experience romantic jealousy toward *all* other women. The existence of romantic jealousy standing alone is fundamentally insufficient to show that biological sex or gender *actually motivated* a particular instance of romantic jealousy, even though biological sex or gender may limit the circumstances under which jealousy may arise. Consequently, the argument that romantic jealousy is inherently based on sex is not only inadequate to support a sex-discrimination claim under the pretext framework, but also inadequate to support a sex-discrimination claim under the mixed-motive framework, which requires an employee to demonstrate that sex was a *motivating* factor in an employment decision.[159]

More fundamentally, however, the foregoing illustration demonstrates that sex and romantic jealousy can be disaggregated. Because sex alone does not *produce* romantic jealousy, romantic jealousy is not the product of a single motive. Rather, when romantic jealousy occurs, more than one motive is at work. Thus, mixed-motive analysis in sex-discrimination claims based on romantic jealousy is appropriate. This raises the question of how an employee could demonstrate that sex actually motivated an employment decision that resulted from romantic jealousy.

B. Applying Mixed-Motive Analysis to Romantic-Jealousy Claims

As the preceding analysis demonstrates, it would be inappropriate to assume that an employer was motivated by sex merely because he admitted to terminating an employee once his spouse experienced jealousy. Because jealousy is not inherently gendered,[160] determining whether gender was a motivating factor in a termination requires an examination of the circumstances giving rise to jealousy. Do those circumstances suggest that an impermissible motive was at work when the jealousy arose?

The seminal case, *Price Waterhouse*, illustrates the importance of examining the circumstances that resulted in a termination when

158. As previously noted, the gender of the parties in the hypothetical scenarios presented in this Note corresponds to the gender of the employer and employee in *Nelson*. *See supra* note 63. This is not intended to suggest that women are more likely than men to experience romantic jealousy. For a recent summary of studies concerning sex differences in the experience of romantic jealousy, see Tucker, *supra* note 143, at 233.

159. *See supra* notes 52–56 and accompanying text.

160. *See supra* notes 148, 152.

assessing mixed-motive sex-discrimination claims.[161] Attorney Ann Hopkins had received consistent praise from partners and clients alike for her competence and performance, but she was denied partnership because of "perceived shortcomings" relating to her "abrasiveness."[162] In analyzing Hopkins' sex-discrimination claim, the Supreme Court recounted the "clear signs" that some partners' negative reactions to Hopkins were influenced by the fact that she was a woman:

> One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school[."] Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." But it was the man who . . . bore responsibility for explaining to Hopkins the reasons for the . . . decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[163]

In describing the proper approach to assessing whether gender impermissibly motivated an employment decision, the Court indicated that judges must consider whether, if asked "at the moment of the decision what its reasons were" for making an employment decision, a truthful employer would admit that "one of those reasons [was] that the . . . employee was a woman."[164] It went on to explain that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[165] As the Court's analysis illustrates, mixed-motive analysis does not ask merely whether an employer's stated reason for an employment decision inherently implicates biological sex or

161. Recall that *Price Waterhouse* was the case that legitimized mixed-motive analysis and led to the passage of the Civil Rights Act of 1991. *See supra* notes 38–51.

162. Price Waterhouse v. Hopkins, 490 U.S. 228, 231–32, 234–35 (1989) (plurality opinion) (quotation marks omitted).

163. *Id.* at 235 (citations omitted).

164. *Id.* at 250–51.

165. *Id.*

gender. Rather, mixed-motive analysis looks behind the stated reason to ask whether the employer actually weighed assessments of the employee motivated by biological sex or gender in reaching an employment decision.

Romantic jealousy involves an assessment that a person constitutes a threat to an existing relationship.[166] When an employer acknowledges that he terminated a particular employee due to romantic jealousy, he also acknowledges that in making the decision to terminate the employee he considered an assessment that the employee represented a threat to his existing relationship. Thus, in analyzing romantic-jealousy claims brought under the mixed-motive framework, the operative question is whether the circumstances suggest that, more likely than not, biological sex or gender motivated an assessment that a particular employee threatened the relationship between the employer and his spouse.

Answering this question in any particular case requires an examination of the facts and circumstances giving rise to romantic jealousy. Yet it is also possible to identify paradigmatic situations suggesting that gender impermissibly motivated how an employee came to be perceived as a threat to an employer's existing romantic relationship. This is not to say that an individualized factual assessment is not required in every case. Rather, the point is that when the facts demonstrate that one of these situations is present, they also suggest that gender motivated the assessment that the employee represented a threat and thus constituted an impermissible motivating factor in any employment decision resulting therefrom. The following subsections describe three paradigmatic situations in which one might reasonably conclude that gender motivated an assessment that an employee represented a threat to an employer's existing relationship.

1. *Sexual Attraction and Sexual Attractiveness.* One can imagine how romantic jealousy could arise as a consequence of assessments concerning the sexual attractiveness of an employee. An employer could express that he finds a particular employee to be sexually attractive. Or his romantic partner might believe he is attracted to a particular employee based on her own assessment of the employee's attractiveness or her beliefs concerning the likelihood that he would

166. *See supra* notes 148–51 and accompanying text.

find the employee to be attractive. In either case, the employee is assessed in terms of sexual attractiveness.

Outside the romantic-jealousy context, legal scholars[167] and courts[168] have recognized that employment decisions motivated by assessments concerning the physical attractiveness of employees may constitute actionable discrimination. One theory for recognizing that assessments of sexual attractiveness bring employment decisions within the purview of Title VII frames such assessments as the product of impermissible sex stereotypes.[169] Other theories supply alternative bases for arriving at the same result.[170] Whatever the underlying theory, the critical point for the analysis at hand is that an assessment concerning the attractiveness of an employee may reflect that gender played an impermissible motivating role in an employment decision.

2. *Conformity with Sex Stereotypes.* It is easy to see how assessments of employees based on sex stereotypes could contribute to romantic jealousy. For example, romantic jealousy may result from

---

167. *See, e.g.*, Enbar Toledano, *The Looking-Glass Ceiling: Appearance-Based Discrimination in the Workplace*, 19 CARDOZO J.L. & GENDER 683, 700 (2013) ("[A]ppearance-based employment decisions may bring an employer's actions under the purview of a relevant statute if they are sufficiently related to an individual's federally protected status.").

168. *See, e.g.*, Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041–42, 1043 (8th Cir. 2010) (reversing summary judgment in favor of an employer because the employee produced evidence that the employer required women filling a particular position to be "pretty" and criticized an employee's appearance); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 77 (Iowa 2013) (Cady, C.J., concurring specially) ("[A]n employer cannot legally fire an employee simply because the employer finds the employee too attractive or not attractive enough." (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion); *Lewis*, 591 F.3d at 1037)).

169. *See Nelson*, 834 N.W.2d at 77 ("It is abundantly clear that a woman does not lose the protection of our laws prohibiting sex discrimination just because her employer becomes sexually attracted to her, and the employer's attraction then becomes the reason for terminating the woman once it, in some way, becomes a problem for the employer. If a woman is terminated based on stereotypes related to the characteristics of her gender, including attributes of attractiveness, the termination would amount to sex discrimination because the reason for termination would be motivated by the particular gender attribute at issue.").

170. For example, one legal scholar has noted that early precedents recognizing a cause of action for sexual harassment under Title VII "relied on a sexual-desire-based notion of causation" in which "the causal mechanism bringing harassment within the prohibition of Title VII is the heterosexual feelings of attraction, lust, or desire that motivate the male harasser to act upon a female employee." David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1719–20 (2002). Under this theory, "Discrimination in the sense of exercising a preference . . . for women rather than men as sex objects . . . becomes sex discrimination in the invidious sense because the targeted woman is disadvantaged relative to her male co-workers." *Id.* at 1720.

an employer working closely with a woman perceived to conform to the stereotype of the "brazen temptress"[171] or the "sexually-accommodating secretary."[172] Conversely, romantic jealousy may stem from an employer working closely with a woman who fails to conform to stereotypes depicting women as caregivers[173] or "pure, delicate and vulnerable creature[s]."[174] In some circumstances, another protected characteristic of an employee, such as her race or her age, may contribute to the decision to assess her according to a particular stereotype.

Importantly, adverse employment actions resulting from consideration of sex stereotypes fall within the scope of Title VII's protections.[175] The critical question appears to be one of causation with respect to the employment decision. In other words, did assessment of the employee according to a sex stereotype lead to an

171. *See, e.g.*, John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 704–05 (1971) (describing the stereotype of a woman "as a brazen temptress, from whose seductive blandishments the innocent male must be protected"); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 395–96 (2004) (observing that Title VII prohibits the use of stereotypes such as "woman as dangerous temptress" or "woman as siren" in making employment decisions).

172. *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978) (noting the prevalence of the "stereotype of the sexually-accommodating secretary" in popular culture).

173. *See* Dédé Koffie-Lart & Christopher J. Tyson, *Title VII of the Civil Rights Act of 1964*, 6 GEO. J. GENDER & L. 615, 620 (2005) (observing that "[t]he recurring stereotype of woman as caregiver has generated numerous lawsuits"); McGinley, *supra* note 171, at 389, 393–94 (observing that "women who do not comport to the female stereotype as caregiver are punished").

174. *See* Johnston & Knapp, *supra* note 171, at 704–05 (observing that "the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to immoral influences").

175. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (quoting L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))); Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) ("Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim." (citing *Price Waterhouse*, 490 U.S. at 251)); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 77 (Iowa 2013) (Cady, C.J., concurring specially) ("If a woman is terminated based on stereotypes related to the characteristics of her gender, . . . the termination would amount to sex discrimination." (citing Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004))); Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of . . . Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 80 (2007) ("[C]ourts have found that harassment based on a person's failure to comport with gender stereotypes is actionable." (emphasis omitted)).

adverse employment decision? In *Price Waterhouse*, the Supreme Court recognized that sex stereotypes may impermissibly motivate an employer's evaluation of an employee's performance-related personality characteristics and implied that employment decisions motivated by sex stereotypes in other ways may be equally discriminatory.[176] Thus, in the ensuing years, "sex-stereotyping jurisprudence has developed to protect many people who are discriminated against because of their failure to conform to a wide array of stereotypes about appropriate behavior and appearance for a particular sex."[177]

3. *Sexually Suggestive Conduct.* Knowledge that an employer has engaged in sexually suggestive conduct toward an employee could also contribute to romantic jealousy. When an employer engages in sexually suggestive conduct toward a particular employee, his romantic partner might understandably perceive the employee to threaten her relationship with the employer. Depending on the nature of the employer's conduct, it might be obvious that the employee's gender played a motivating role in the employer's decision to engage in sexually suggestive conduct toward her. That such conduct may be impermissibly motivated by gender is reflected in the fact that employers face potential liability for sexually harassing conduct toward employees even in the absence of jealousy.[178]

Conversely, sexually suggestive conduct by an employee directed toward an employer does not suggest that any resulting termination was motivated by the employee's gender. The employee who engaged in sexually suggestive conduct in the workplace, rather than her employer, is the actor whose conduct might have been motivated by

176. *See Price Waterhouse*, 490 U.S. at 251 (explaining that sex stereotypes are problematic because "Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes" (emphasis added) (quoting *L.A. Dep't. of Water & Power*, 435 U.S. at 707 n.13) (quotation marks omitted)); *id.* at 243–44 (pointing to evidence that Congress recognized that "[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are based on any . . . forbidden criteria" (quoting 110 CONG. REC. 7213 (1964)) (quotation marks omitted)).

177. Sunish Gulati, Note, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177, 2177 (2003); *see* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1038, 1042 (8th Cir. 2010) (reversing summary judgment for an employer in a case in which the employee alleged "that her employer found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype").

178. *See infra* note 221 and accompanying text.

gender. Put another way, the gender motivations at play in this scenario flow away from, rather than toward, the employee. A court might deny a romantic-jealousy claim in such circumstances because the jealousy that led to the employee's termination was motivated not by her gender, but by the gender of her employer. Alternatively, a court might conclude that the employee's actions caused the jealousy that resulted in her termination.[179]

C. The Results of Applying Mixed-Motive Analysis to Romantic-Jealousy Claims

Given that biological sex or gender need only be a motivating factor in an adverse employment decision to violate Title VII,[180] the preceding analysis clarifies that the strength of the theoretical basis for recognizing a termination based on romantic jealousy as unlawful discrimination turns on the underlying circumstances of the particular case. It also demonstrates that when an employee is terminated because of romantic jealousy, the presence of certain paradigmatic situations may strongly suggest that the jealousy was motivated by gender. To the extent that these situations commonly motivate jealousy, the foregoing analysis suggests that many employment decisions resulting from romantic jealousy violate Title VII. But critically, the outcome of a romantic-jealousy claim never turns merely on the employee's ability to show that jealousy existed. Rather, it turns on the employee's ability to point to specific facts suggesting that the employer considered an assessment of the employee motivated by gender in making an employment decision.

Note the common thread that runs between the paradigmatic situations described above. Namely, each represents a situation involving conduct that could independently support liability under Title VII in the absence of jealousy. When the circumstances giving rise to jealousy could not lawfully serve as the basis for an employment decision, it makes sense to recognize that unlawful discrimination has occurred. An employer cannot lawfully terminate an employee based on feelings of attraction toward her[181] or based on the degree to which she conforms with gender stereotypes.[182] Similarly, an employer who engages in sexually suggestive conduct

179. *See supra* notes 96–97, 100–01 and accompanying text.

180. *See supra* Part I and notes 164–65 and accompanying text.

181. *See supra* notes 167–68 and accompanying text.

182. *See supra* notes 175, 177 and accompanying text.

toward an employee may be liable for sexual harassment.[183] When the sort of conduct that could support Title VII liability gives rise to jealousy and an employee is terminated as a result, the fact that such conduct occurred constitutes evidence that gender probably motivated that jealousy and any resulting termination.[184]

Importantly, the theoretical basis for recognizing that sex discrimination has occurred is not diminished simply because the employer himself was not the individual who became jealous. By making an employment decision based on the jealousy of his romantic partner, an employer effectively adopts that jealousy and its underlying motivations as the basis for his decision. Furthermore, the jealous person may be an employee in addition to being the employer's romantic partner.[185] An employment relationship between an employer and his romantic partner may serve as an additional basis for imputing the partner's discriminatory motives to the employer. The Supreme Court recently held that the discriminatory motives of supervisors may be imputed to employers.[186] Thus, an employer may be liable for the discriminatory motives of an employee–spouse who stands in the relationship of supervisor to a terminated employee. The Court explicitly left open the question of whether the discriminatory motives of nonsupervisory coworkers that influence the ultimate decision to terminate an employee may also be imputed to employers.[187] However, the argument that an employer should be liable when sex motivates an employee–spouse is stronger than the argument that an employer should be liable when sex motivates a nonspouse employee. This is particularly true when an

183. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986) (describing sexual harassment prohibited by Title VII).

184. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (observing that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be *evidence* that gender played a part").

185. For example, the person experiencing jealousy was an employee in *Nelson*, *Platner*, and *Tenge*. Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 903 (8th Cir. 2006); Platner v. Cash & Thomas Contractors, Inc., 908 F.3d 902, 903 (11th Cir. 1990); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 66 (Iowa 2013).

186. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192–93 (2011) ("Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action,' precisely as the text requires."). Though *Staub* addressed the question of employer liability for the discriminatory motives of supervisors in the context of the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Court explicitly acknowledged that USERRA is "is very similar to Title VII." *Id.* at 1191.

187. *Id.* at 1194 n.4.

employer explicitly adopts the jealousy experienced by an employee–spouse as the reason for terminating another employee.

Nonetheless, an employer found liable for sex discrimination under mixed-motive analysis may be able to limit damages. For example, assume that an employee has pointed to facts demonstrating that gender motivated the romantic jealousy her employer cited as the reason for her termination. Under the mixed-motive framework, she is entitled to prevail on the question of liability, but she will not receive compensatory damages if her employer can demonstrate that he would have made the same decision had he not been impermissibly motivated by gender.[188] This raises the question of whether the employer could argue that jealousy is not inherently gendered and point to the jealousy experienced by his spouse to prove his same-decision defense. Under Title VII, however, an employer may limit damages only if he demonstrates that he "would have taken the same action in the absence of the impermissible motivating factor."[189] Thus, when an employee shows that gender played a motivating role in bringing about the jealousy that caused her termination, the employer loses his ability to point to that jealousy as a legitimate reason for deciding to terminate her. In other words, the employer could limit damages only if he could point to a legitimate reason for terminating the employee that was independent of the jealousy experienced by his spouse.

As the foregoing analysis demonstrates, a mere accusation that jealousy was the reason for an employment decision is an insufficient basis to conclude that gender motivated that decision. From an employer's admission that romantic jealousy was the sole reason for his decision to terminate an employee, it does not necessarily follow that his decision was motivated by gender. But the fact that romantic jealousy is not always gender-motivated does not mean that it never is. Thus, mixed-motive analysis of romantic-jealousy claims calls for careful assessment of the circumstances to determine whether gender actually motivated the jealousy that led an employer to terminate his employee. Only by engaging in this analysis can courts properly

188. *See supra* note 56 and accompanying text.

189. 42 U.S.C. § 2000e-5(g)(2)(B) (2012). As envisioned by the Supreme Court in *Price Waterhouse* before the Civil Rights Act of 1991, *see supra* notes 49–52 and accompanying text, the same-decision defense required an employer to "show that its legitimate reason, *standing alone*, would have induced it to make the same decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion) (emphasis added).

distinguish between claims that are entitled to relief and claims that are not.

IV. RECONSIDERING THE APPLICATION OF FAVORITISM AND ROMANTIC-RELATIONSHIP PRECEDENTS TO ROMANTIC-JEALOUSY CLAIMS

Assuming that gender motivates some jealousy-based terminations, the question then becomes whether courts should apply favoritism and romantic-relationship precedents to dismiss romantic-jealousy claims. This Part argues that the rationales supporting the dismissal of sex-discrimination claims arising in the context of favoritism and romantic relationships do not justify the dismissal of sex-discrimination claims arising in the context of romantic jealousy. In addition, this Part illustrates why *Nelson*'s extension of the rule prohibiting sex-discrimination claims arising in the context of romantic relationships to prohibit claims arising in the context of nonromantic personal relationships is deeply problematic.

A. Reconsidering the Limits of Favoritism Precedents

Employment decisions based on favoritism and employment decisions based on romantic jealousy unquestionably share some similarities. In both circumstances, employment decisions are not based on an employee possessing or lacking work-related skills or qualifications.[190] Furthermore, in both circumstances, employment decisions are intended to benefit an individual with whom an employer has a relationship. Given these similarities, courts have predictably applied favoritism precedents in deciding sex-discrimination claims based on romantic jealousy.[191] But employment decisions based on favoritism differ from those based on romantic jealousy in significant respects, suggesting that this practice lacks a stable doctrinal foundation. This Subsection demonstrates that these underlying differences are sufficiently important to counsel against reliance on favoritism precedents in analyzing romantic-jealousy claims.

Employment decisions based on favoritism and those based on romantic jealousy differ in purpose. Decisions based on favoritism

190. *See* BLACK'S LAW DICTIONARY 683 (9th ed. 2009) (defining favoritism as being "based on factors other than merit").

191. *See supra* Part II.A.

typically occur when an employer seeks to confer an employment benefit on another person based on his relationship with that individual.[192] In another conceivable variant of favoritism, the employer refrains from imposing an adverse employment consequence on the favored employee. Whatever action the employer takes, his primary goal is to engage in favorable treatment toward the favored employee, whether directly (by granting a benefit) or indirectly (by preventing a harm). The resulting harm to other employees is a secondary consequence of achieving this primary goal. The employer is not unlawfully motivated to single out a particular employee for unfavorable treatment on the basis of a protected characteristic.

In contrast, decisions based on romantic jealousy involve an employer imposing an adverse employment action on a particular employee because she has become the object of jealousy. Although the employer's primary purpose might be to alleviate his romantic partner's jealousy, the employer terminates a particular employee to accomplish that purpose. And as the preceding analysis has shown, an unlawful motivation may underlie the jealousy the employer seeks to alleviate.[193]

That gender may have a causal connection to employment decisions based on romantic jealousy further distinguishes those decisions from employment decisions based on favoritism. Gender has no causal connection to employment decisions made to favor a family member or a friend.[194] And although sex may motivate employment decisions favoring a paramour, the causal connection flows from the employer to the *favored* employee rather than from the employer to the *disfavored* employee.[195] But when an employment decision is based on romantic jealousy motivated by gender, the sex

192. *See supra* Part II.A.

193. *See supra* Part III.B.

194. *See* Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 555 (2009) (reasoning that nepotism is not sex discrimination because "no one of any sex, other than this particular person, could have gotten the job"); Poole, *supra* note 29, at 858 (noting that "[k]inship is largely an accident of birth").

195. Poole, *supra* note 29, at 849 ("In sexual favoritism cases, it is the paramour's gender, not the victim's, that partially motivates the employer or supervisor." (citing Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 570 (1994))).

of the harmed employee is causally connected to the employer's decision.[196]

As this analysis demonstrates, employment decisions based on favoritism fundamentally differ from those based on romantic jealousy. Critically, these differences illuminate why the primary rationale for the rule that employment decisions based on favoritism do not constitute sex discrimination does not apply to decisions based on romantic jealousy. As the Equal Employment Opportunity Commission (EEOC) has recognized, "favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."[197] In contrast, an isolated instance of romantic jealousy does not disadvantage both genders equally. Rather, the resulting employment decision impacts only one employee, and thus only one gender. Admittedly, it might be that the employer acted for reasons wholly unmotivated by gender, or it might be that gender played a motivating role.[198] The key distinction is that it is impossible to determine whether gender motivated an employment decision arising due to jealousy without looking into the circumstances.

B. Reconsidering the Limits of Romantic-Relationship Precedents

Courts have consistently refused to recognize sex-discrimination claims when there is a consensual sexual or romantic relationship

196. *See supra* Part III.B–C. Admittedly, the significance of this distinction in mixed-motive analysis is unclear. The lack of clarity stems from the fact that although 42 U.S.C. § 2000e-2(m) clearly provides that unlawful discrimination occurs when gender is a motivating factor in an employment decision, it does not specify *whose* gender may not be considered. Consequently, § 2000e-2(m) may be interpreted to forbid any employment decision motivated by gender, including an employment decision motivated by the gender of a person other than the adversely impacted employee. Phillips, *supra* note 195, at 569 & n.110. But § 2000e-2(m) may also be interpreted to provide that an employment decision constitutes unlawful discrimination only if the gender of the adversely impacted employee motivated the employer. Phillips, *supra* note 197, at 570–71; Poole, *supra* note 29, at 849. Because the introductory clause of § 2000e-2(m) contains the qualifier "[e]xcept as otherwise provided in this subchapter," it is arguably significant for purposes of interpreting § 2000e-2(m) that § 2000e-2(a) prohibits employment discrimination against any individual "because of such individual's" protected characteristic. Phillips, *supra* note 197, at 570–71; Poole, *supra* note 29, at 849.

197. U.S. EEOC, NOTICE NO. 915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html (citing Benzies v. Ill. Dep't of Mental Health, 810 F.2d 146, 148 (7th Cir. 1987); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 180 (3d Cir. 1985)).

198. *See supra* Part III.B.

between employer and employee.[199] But in cases involving terminations resulting from romantic jealousy, courts have extended the general rule that claims arising in the context of romantic relationships are not actionable under Title VII to claims arising outside the context of such relationships.[200] This Subsection considers whether the rationales for the romantic-relationship rule justify courts' extension of the rule to dismiss discrimination claims based either on sexually suggestive employee conduct or the existence of nonromantic personal relationships between employers and employees.

The primary rationale underlying the rule that Title VII does not apply to claims stemming from romantic relationships is that Title VII prohibits making employment decisions "based on a person's sex, not his or her sexual affiliations."[201] Notably, the distinction between sex and sexual affiliations arose in the sexual-favoritism context before Congress amended Title VII to endorse mixed-motive analysis.[202] In fact, the Supreme Court had previously interpreted the history and language of Title VII to be concerned primarily with differential treatment based solely on protected characteristics.[203] Today, however, relying on sex as a motivating factor in an employment decision constitutes unlawful discrimination even when other legitimate factors also motivate the decision.[204] It is arguably unclear whether the distinction between sex and sexual affiliations remains a defensible basis for rejecting discrimination claims arising in the context of romantic relationships without individualized inquiry into whether gender actually motivated a particular termination.[205]

---

199. *See supra* notes 81, 85 and accompanying text.

200. *See supra* Part II.B.

201. DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 306–07 (2d Cir. 1986); *see also supra* Part II.B.

202. *See DeCintio*, 807 F.2d at 306–08 (drawing this distinction in the context of an employment decision intended to favor a paramour (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))); *see also supra* notes 33–37, 52–54 and accompanying text.

203. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.").

204. *See supra* note 52 and accompanying text.

205. For example, one might argue that distinctions based on sexual affiliation cannot justify dismissal of claims arising in the context of employer–employee romantic relationships because gender is a motivating factor in romantic relationships and in any termination stemming from such relationships. But this argument is susceptible to the same deficits as the argument that

In any event, the distinction between sex and sexual affiliations provides only a limited basis for extending the romantic-relationship rule beyond the context of romantic relationships. Sexually suggestive employee conduct does not necessarily indicate that a romantic relationship exists. Much like an employee engaged in a romantic relationship with her employer,[206] however, an employee who knowingly engages in sexually suggestive conduct at work injects a sexual component into the workplace. Unquestionably, an employer's discouraging sexual conduct in the workplace is not problematic under Title VII.[207] Most employers generally discourage such conduct, and most employees reasonably anticipate that such conduct could end their employment. Moreover, courts are accustomed to distinguishing between sexual and nonsexual conduct in various legal contexts.

In contrast, extending the romantic-relationship rule to dismiss claims arising in the context of personal relationships not involving employee sexual conduct[208] is far less defensible. The recognized distinction between sex and sexual affiliations[209] does not justify extending the rule in this context because personal relationships are not necessarily sexual or romantic. Unlike an employee who engages in sexually suggestive conduct at work or has a romantic relationship with her employer, an employee who has a platonic friendship with

---

romantic jealousy is inherently based on gender. *See supra* Part III.A. An alternate argument comes into focus when the sexual-affiliation distinction is relied upon to dismiss claims arising from terminations based on sexual orientation. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) ("Because the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."). Arguably, the sexual-affiliation distinction does not justify dismissal in this context because terminations based on sexual orientation may be impermissibly motivated by sex stereotypes. The EEOC and an increasing number of courts have endorsed this position. Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Rehearing at 3, Muhammad v. Caterpillar, Inc., 767 F.3d 694 (7th Cir. 2014) (No. 12–1723), 2014 WL 5323209, at *1. The validity and scope of the sexual-affiliation distinction are beyond the scope of this Note.

206. *See* Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL'Y 237, 246 & n.74 (2006) (distinguishing between romantic relationships that include a sexual component and other workplace relationships, including those that may involve psychological intimacy).

207. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998) (establishing an affirmative defense from vicarious liability in harassment claims when an "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer").

208. *See supra* notes 134–36 and accompanying text.

209. *See supra* note 82 and accompanying text.

her employer does not introduce a sexual component into the workplace.

Importantly, personal relationships are commonplace in the workplace,[210] and the workplace environment is inherently conducive to their formation.[211] Indeed, social science suggests that personal relationships are bound to form in the workplace—and that such relationships overwhelmingly benefit both employers and employees.[212] Over time, most workplace relationships tend to develop qualities similar to those involved in intimate personal relationships.[213] Distinguishing between ordinary workplace relationships and personal relationships is not only unfamiliar territory for courts, but also profoundly problematic because the line between the two types of relationships is uncertain at best.[214]

That employment decisions motivated by feelings are generally not prohibited by Title VII[215] does not justify extension of the romantic-relationship rule to personal relationships. The romantic-relationship rule essentially operates as a presumption that employment decisions stem from personal feelings whenever a romantic relationship exists between an employer and an employee.[216]

---

210. *See, e.g.*, Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-workers*, 72 SOC. FORCES 843, 850 (1994) (concluding based on empirical research that half of American workers form "close friendships" and discuss "important matters" with coworkers); *see also* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000) ("For those who work full-time, most discussions of current issues and events, movies, sports, popular culture, and personal relationships outside the family are with coworkers.").

211. *See* Estlund, *supra* note 210, at 12 (noting that the social environment of the workplace itself "engenders personal feelings of affection, sympathy, empathy, and friendship among coworkers"); Rabin-Margalioth, *supra* note 206, at 246 n.74 ("The workplace is a stage to form other types of personal relationships such as strong friendships or mentorships.").

212. Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 130 (2011).

213. *See, e.g.*, Estlund, *supra* note 210, at 9 ("Through . . . repeated and frequent interactions, coworkers often learn about each others' lives and develop feelings of affection, mutual understanding, empathy, and loyalty.").

214. *See id.* at 12 ("Relationships that form in the workplace often spill beyond it, and make up much of our social circles." (citing ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 35–52 (1997))); Rosenbury, *supra* note 212, at 119 (noting that workplace relationships that "are at times primarily transactional" may "at other times . . . take on intimate qualities similar to those of family relationships or friendships").

215. *See supra* note 83 and accompanying text.

216. *See id.* Some commentators argue that courts deciding Title VII claims have generally "begun to presume that personal animosity most likely motivated the employer." Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to*

But applying the same presumption whenever a personal relationship exists between an employer and an employee is problematic. Significantly, the presence of the triggering condition for the presumption—the existence of a personal relationship rather than an ordinary workplace relationship—would be difficult to discern reliably. More fundamentally, social science suggests that personal relationships in the workplace are enormously common.[217] Consequently, a general rule that employment decisions based on personal relationships do not constitute sex discrimination runs the risk of eviscerating the protections afforded by Title VII.

Limiting the personal relationships that can trigger dismissal of sex-discrimination claims to those that are consensual cannot cure the significant problems with extending the romantic-relationship rule to the personal-relationship context. As the concurring justices in *Nelson* recognized, "subtle issues of power and control . . . make the line between consensual and submissive relationships difficult to draw."[218] In some cases, that line might be drawn in the wrong place, meaning that an employer's unreciprocated and unwelcome conduct toward an employee could ultimately result in the dismissal of her claim. In addition, an employer's unreciprocated and unwelcome conduct could easily be interpreted to support the conclusion that an employer–employee relationship was personal and consensual. For example, the concurring justices in *Nelson* reasoned that the sexually suggestive comments by Dr. Knight—comments they acknowledged "would commonly be viewed as inappropriate" and "beyond the reasonable parameters of workplace interaction"—supported the conclusion that he and Nelson had a consensual personal relationship.[219] Yet as the majority opinion acknowledged, the same comments could have supported a claim for sexual harassment against him.[220] Importantly, both forms of sexual harassment recognized under Title VII typically involve sexually suggestive

'No Cause' Employment, 81 TEX. L. REV. 1177, 1179 (2003). Note that the facts of *Nelson* do not suggest that Dr. Knight felt personal animosity toward Nelson. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 66 (Iowa 2013).

217. *See supra* notes 210–13 and accompanying text.

218. *Nelson*, 834 N.W.2d at 80 (Cady, C.J., concurring specially) (citing Billie Wright Dziech, Robert W. Dziech II & Donald B. Hordes, *'Consensual' or Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL'Y 83 (1999)).

219. *Id.* at 78, 79–80.

220. *Id.* at 72 n.7 (majority opinion).

conduct.[221] Of course, suggestive conduct that is competent to *support* a harassment claim is not necessarily pervasive or severe enough, standing alone, to *prove* actionable harassment.[222] But any rule that allows an employer's unreciprocated sexually suggestive conduct to trigger dismissal of an employee's sex-discrimination claim on summary judgment is flatly inconsistent with the spirit and purpose of Title VII and other antidiscrimination laws.

Critically, from the fact than an employee did not tell her employer she was offended by his behavior[223] or the fact that she did not file a sexual-harassment claim,[224] it does not follow that the employer's conduct was welcome. There are many reasons why an employee enduring unwelcome sexual conduct at the hands of her employer might choose not to complain or decide not to file a sexual-harassment claim.[225] Her employer's conduct might be offensive, but not severe or pervasive enough to prove a sexual-harassment claim.[226] Her wisest course of action might be to quietly seek other employment, particularly if she lives in a rural town with a limited job

221. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986) (describing sexual harassment prohibited by Title VII); *see also* Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908 (8th Cir. 2006) ("Title VII now prohibits both quid pro quo harassment, where an employee's submission to or rejection of a supervisor's unwelcome sexual advances is used as the basis for employment decisions, and hostile work environment harassment, where 'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993))).

222. *Harris*, 510 U.S. at 21 (concluding that to establish a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment" (quoting *Meritor*, 477 U.S. at 67) (quotation marks omitted)).

223. *See Nelson*, 834 N.W.2d at 66 ("Nelson does not remember ever telling Dr. Knight . . . that she was offended.").

224. *See id.* at 65, 72 n.7 (pointing out that Nelson "did not bring a sexual harassment or hostile work environment claim"). Although Nelson did not initially file a sexual-harassment claim, she did later argue that her petition was broad enough to support a sexual-harassment claim. *See* Second Petition for Rehearing at 4, *Nelson*, 834 N.W.2d 64 (No. 11–1857).

225. *See, e.g.*, Jo Annette Jacobs, Note, *No More Nervous Breakdowns: Sexual Harassment and the Hostile Work Environment*, 62 UMKC L. REV. 521, 523–25 (describing considerations employees may weigh in choosing how to respond to sexual harassment); Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 467–68 (2002) (describing "well-documented reasons why women often fail to complain about workplace harassment").

226. *See supra* note 222 and accompanying text.

market[227] or works in a specialized field with limited employment opportunities. Alternatively, because she reasonably believes that she lacks any viable employment alternative, she might try to defuse the situation through avoidance.[228] In short, employees often avoid directly confronting employers who engage in unwelcome sexual conduct,[229] and they often do so for logical and understandable reasons.

As the preceding analysis suggests, even a rule that permits only consensual personal relationships between employers and employees to trigger the dismissal of sex-discrimination claims sweeps far too broadly. Such a rule would operate to protect employers from liability for sex discrimination in circumstances arising through no fault of employees. Indeed, such a rule could operate to protect an employer who engages in sexually suggestive behavior toward an employee because he finds her to be sexually desirable.

CONCLUSION

Judicial hesitation to recognize romantic-jealousy claims likely stems at least in part from apprehension about opening the floodgates to such claims.[230] But any fear that recognizing romantic-jealousy claims will lead to widespread, devastating judgments against employers is misplaced. Jealousy is rarely discussed in discrimination cases, which suggests that employers rarely cite jealousy as the basis

227. The 2010 census reported the population of the town where Dr. Knight's dental office is located as 25,206. *State & County QuickFacts: Fort Dodge (City), Iowa*, U.S. CENSUS BUREAU (July 8, 2014, 6:44 PM), http://quickfacts.census.gov/qfd/states/19/1928515.html.

228. *See* Jacobs, *supra* note 225, at 524 (observing that the most common response to sexual harassment "is to avoid or ignore it in hopes that it will go away" or to "seek to defuse the situation by joking, stalling, or negotiating").

229. *Id.* ("Very few women use direct confrontation, such as telling the harasser to stop or pursuing a formal complaint.").

230. *See Nelson*, 834 N.W.2d at 70 ("Nelson's viewpoint would allow any termination decision related to a consensual relationship to be challenged as a discriminatory action because the employee could argue the relationship would not have existed but for her or his gender."). Judicial hesitation to recognize romantic-jealousy claims might also stem in part from the tension between antidiscrimination laws and the employment-at-will doctrine or the desire to safeguard the institution of marriage. *See id.* at 75 (Cady, C.J., concurring specially) ("Thus, while the loss of a job is often devastating to an employee, and at times unfair, these considerations do not play a role under our employment-at-will doctrine, and our exceptions to this law, such as sex discrimination, are only based on the underlying discriminatory motivation of the decision maker." (citing Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 762 (Iowa 2009))); *id.* at 67–71 (majority opinion) (emphasizing that Nelson was perceived to be a "threat" to the Knights' marriage).

for their employment decisions. It is safe to assume that this trend would remain unchanged if employers learned that they could face potential liability for jealousy-based employment decisions.[231] Furthermore, employee victories would be primarily symbolic in cases in which the liable employer proved that he would have made the same decision even if he had not been motivated by gender. These symbolic victories would offer psychological, if not financial, recompense to victims of discrimination. They would also perform a meaningful expressive function by reinforcing the fundamental values underlying antidiscrimination laws.

Whatever the potential costs of acknowledging the viability of romantic-jealousy claims, they do not outweigh the potential costs of continued refusal to recognize theoretically viable sex-discrimination claims. The suggestion that romantic jealousy generally constitutes a lawful basis for employment decisions creates a perverse incentive for employers to falsely cite jealousy as the motivation for their employment decisions. In theory, jealousy could come to operate as a de facto defense to sex-discrimination claims—a defense that would be alarmingly simple to invoke. Admittedly, courts could develop standards to limit the operation of jealousy as a defense to sex-discrimination claims to circumstances in which jealousy was justified or reasonable. But this approach to solving the "de facto defense" problem is hardly preferable to avoiding the problem altogether through careful application of mixed-motive analysis to romantic-jealousy claims.

To be sure, we might be sympathetic to individuals experiencing romantic jealousy. Jealousy is unpleasant, and some jealous persons are justified in fearing that a relationship is in jeopardy. But jealousy can be a destructive force causing harm that extends beyond the person experiencing it.[232] Moreover, it is not difficult to imagine

231. Even if this assessment is incorrect, courts should arguably refrain from considering the possibility of increased judicial workload when shaping the substantive law. *See generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (arguing in favor of a presumption against floodgates arguments).

232. Tucker, *supra* note 143, at 224–27. It is well documented, for example, that romantic jealousy often motivates homicide and abuse. *See id.* at 225–26 (summarizing research concerning the connection between romantic jealousy and incidents of homicide and abuse). Even if society chooses to accept a conception of romantic jealousy "as both innate and inextricable from love," it must not be deluded into viewing jealousy as benign. *Id.* at 222, 224–31 (concluding that "jealousy is far from benign, and as a culture we should therefore be interested in minimizing, rather than encouraging, its effects").

jealousy arising based on the perception of a threat that is entirely imagined.

Antidiscrimination laws do not protect employees against general unfairness,[233] but courts must be mindful of the underlying purposes of those laws in determining the scope of their protections. Sex-discrimination claims that arise because an employer terminated an employee due to romantic jealousy call for thorough analysis of the underlying circumstances to determine the motivations that gave rise to jealousy. To accurately determine whether a jealousy-based termination was simply unfair or whether it constituted unlawful discrimination, courts must look behind the jealousy.

233. *See Nelson*, 834 N.W.2d at 69 ("Title VII and the Iowa Civil Rights Act are not general fairness laws, and an employer does not violate them by treating an employee unfairly so long as the employer does not engage in discrimination based upon the employee's protected status.").